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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DALE LAUE,

Plaintiff and Appellant,

v.

LILIANA A. ORTIZ, et al.,

Defendants and Respondents.

H043206; H043713; H044063
(Santa Clara County
Super. Ct. Nos. 115CV284013;
115CV289248; 113CV250570)

Plaintiff Dale Laue has filed multiple lawsuits against defendant Liliana A. Ortiz, his neighbor. We address three separate appeals arising in three different superior court cases: *Laue v. Ortiz*, H044063 (H044063) (Santa Clara County Superior Court Case No. 113CV250570 (CV250570)); *Laue v. Ortiz*, H043206 (H043206) (Santa Clara County Superior Court Case No. 115CV284913 (CV284013)); and *Laue v. Ortiz*, H043713 (H043713) (Santa Clara County Superior Court Case No. 115CV289248 (CV289248)). All are indirectly related. This court ordered the three current appeals to be considered together for oral argument and decision.[1]

[1] In H043713, we granted a motion to take judicial notice of the record on appeal in *Laue v. Ortiz* (March 11, 2015, H040705 [nonpub. opn.] (H040705)). On our own motion, we also take judicial notice of that record in the other two appeals before us. (See Evid. Code, §§ 452, subd. (d), 459.) In addition, on our own motion, we take judicial notice of the appellate record in *Laue v. Ortiz* (March 11, 2015, H041044 [nonpub. opn.] (H041044), app. dism.); and *Laue v. Ortiz* (H042743), app. abandoned) in the three appeals before us. (See Evid. Code, §§ 452, subd. (d), 459.)

In CV250570, Laue filed a first amended complaint against Ortiz (and Doe defendants) on August 5, 2013. It alleged five causes of action: (1) libel; (2) slander; (3) intentional interference with economic advantage; (4) negligent interference with economic advantage; and (5) intentional infliction of emotional distress. By order filed on November 18, 2013, the trial court granted Ortiz's special motion to strike Laue's first amended complaint (anti-SLAPP motion) pursuant to Code of Civil Procedure section 425.16.[2] That order was affirmed on appeal by this court in H040705, review denied May 20, 2015, S225568. Laue has repeatedly sought to undo the November 18, 2013 order, even after it was upheld on appeal and became final.

In CV250570, Laue also separately appealed from the initial award of attorney's fees and costs to Ortiz (the prevailing defendant) pursuant to section 425.16, subdivision (c)(1) (hereafter § 425.16(c)(1)).[3] This court dismissed the appeal in H041044 after concluding that the appeal had been taken from a nonappealable order.

The appeal in H044063 is from an order filed February 10, 2016 in CV250570. It required Laue to pay additional attorney fees and costs of $5,605 to Ortiz. This is one of multiple awards of attorney fees and costs against Laue in CV250570. The order from which Laue is now appealing followed Laue's abandonment of a previous appeal from an earlier award of attorney fees and costs in H042743. (See *ante*, fn. 1.) With respect to the appeal in H044063, we asked the parties to provide supplemental briefing on questions of appealability and notified them of the possibility that this court would dismiss the appeal on its own motion as an appeal from a nonappealable order.

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[2] "SLAPP is an acronym for 'strategic lawsuit against public participation.' [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815.) All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[3] Section 425.16(c)(1) provides in pertinent part that, with an exception not here applicable, "a prevailing defendant" on an anti-SLAPP motion "shall be entitled to recover his or her attorney's fees and costs."

The appeal in H043206 arose from another damages action filed by Laue against Ortiz (and Doe defendants). On appeal, Laue explains that he was forced to file this action (CV284013) because he could not amend the complaint in CV250570 to add the causes of action arising against Ortiz since August 2013, impliedly because the court had granted Ortiz's anti-SLAPP motion. The complaint in this case set forth nine causes of action. Laue appeals from a November 20, 2015 order, which (1) denied Laue's request for permission to conduct discovery notwithstanding section 425.16's stay of discovery; (2) granted Ortiz's anti-SLAPP motion targeting five of the causes of action pursuant to section 425.16; and (3) denied Laue's request for attorney fees pursuant to section 425.16(c)(1).[4]

The appeal in H043713 is from the judgment of dismissal, filed June 20, 2016. The judgment followed an order sustaining a demurrer to Laue's first amended complaint, denominated an independent action in equity, with leave to amend within 10 days. In this action (CV289248), Laue sought to vacate the November 18, 2013 order granting Ortiz's anti-SLAPP motion in CV250570—which as indicated was affirmed on appeal in H040705—based on alleged extrinsic fraud or mistake. On appeal, Laue also seeks to challenge the trial court's prejudgment order finding that he was a vexatious litigant and there was no reasonable probability that he would prevail against Ortiz and requiring him to furnish security in the amount of $25,000. (See §§ 39l, subd. (b)(2), 391.1, 391.3, subd. (a).)

We separately address each appeal.

[4] Section 425.16(c)(1) provides in pertinent part: "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

Appeal in Original Lawsuit: H044063

In H044063, Laue seeks to challenge the February 10, 2016 order awarding attorney fees and costs of $5,605. The court based its order on section 425.16(c)(l) and section 685.040, a part of the Enforcement of Judgments Law (§ 685.010).[5] This order was made in CV250570, years after the November 18, 2013 order granting Ortiz's anti-SLAPP motion.

Laue argues that the claimed attorney fees were "not incurred enforcing a judgment." He also contends the trial court should have denied Ortiz's motion to recover attorney fees and costs incurred on appeal as untimely because the motion was filed beyond the deadline for filing set by rules 3.1702(c) and 8.278(c)(1). Laue asserts that the trial court's failure to deny Ortiz's motion for attorney fees as untimely violated his due process and equal protection rights under the Fourteenth Amendment to the United States Constitution and under article I of the California Constitution. He contends that "the process due to [him] simply consists of the trial court's adherence to California law." He claims that the trial court deprived him of equal protection of the law by excusing

[5] "Under Code of Civil Procedure section 685.040, a judgment creditor is entitled to the reasonable and necessary costs of enforcing the judgment, including statutory attorney fees 'otherwise provided by law.' " (*Conservatorship of McQueen* (2014) 59 Cal.4th 602, 604-605, fn. omitted.) Section 685.080, subdivision (a), provides in part: "The judgment creditor may claim costs authorized by Section 685.040 by noticed motion. The motion shall be made before the judgment is satisfied in full, but not later than two years after the costs have been incurred." "[E]fforts in opposing" an appeal of a judgment are "not undertaken to *enforce* the judgment but to defend it against reversal or modification." (*Conservatorship of McQueen*, *supra*, at p. 605.) "Where a statute provides for attorney fees, they are generally available both at trial and on appeal (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927), and the procedure for their recovery is set out by court rule rather than by section 685.080. (See Cal. Rules of Court, rules 3.1702(c)(1), 8.278(c).)" (*Ibid*.) All further references to the rules are to the California Rules of Court.

"Ortiz's untimely motion in violation of the law," impliedly because she was represented by an attorney, whereas he represented himself.

We raised the issue of appealability on our own initiative and requested supplemental briefing.

I

Subsequent Procedural History in CV250570

On June 23, 2015, following the issuance of the remittiturs in both H040705 and H041044 in May of 2015, Laue filed a motion for an order setting aside both the order granting Ortiz's anti-SLAPP motion and the initial award of attorney fees and costs to her and for an award of attorney fees and costs as a sanction against Ortiz (§ 425.16(c)(1)). His motion was based on allegedly "uncontroverted evidence" that Ortiz committed perjury and extortion which resulted in a fraud on the court and a miscarriage of justice.[6]

By an order filed on July 30, 2015, the trial court (1) denied Laue's set-aside motion and (2) granted Ortiz's motion for a further award of attorney fees and costs of $26,715.46, mostly related to Laue's unsuccessful prior appeals, his unsuccessful petition for review in the Supreme Court, and Laue's motion. Laue appealed from this order in H042743.

Respondent Ortiz moved to dismiss the appeal in H042743. On October 19, 2015, Laue filed an abandonment of the appeal in the superior court, and a notice of abandonment was received by this court. (See rule 8.244(b).) The filing of an abandonment of the appeal "effects a dismissal of the appeal and restores the superior

[6] We granted Laue's request that we take judicial notice of 10 documents filed in CV250570: Laue's Notice of Motion and Motion filed June 23, 2015; the supporting memorandum of points and authorities filed June 23, 2015; two supporting declarations filed June 23, 2015; an attorney declaration in support of Laue's request for an award of attorney fees as a sanction against Ortiz; Laue's memorandum of costs on appeal; Ortiz's opposition to the motion; Laue's memorandum of additional costs; Laue's reply in support of his motion; and the trial court's order, filed June 30, 2015, denying the motion and awarding an additional $26,715.46 in attorney fees and costs to Ortiz.

court's jurisdiction." (Rule 8.244(b)(1).) This court denied Ortiz's motion to dismiss the appeal as moot.

In the trial court, subsequent to Laue's abandonment of the appeal from the July 30, 2015 order awarding attorney fees and costs, Ortiz moved for a third award of attorney fees and costs, and the matter was heard on January 28, 2016. (See *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 447 [prevailing defendant on an anti-SLAPP motion may recover attorney fees and costs pursuant to former section 425.16, subdivision (c) (now (c)(1)), even where the plaintiff voluntarily dismisses his appeal from the order granting the defendant's anti-SLAPP motion]; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500 [prevailing defendant on an anti-SLAPP motion may recover attorney fees and costs pursuant to former section 425.16, subdivision (c) (now (c)(1)), incurred in the appeal from the order granting the defendant's anti-SLAPP motion].) At the hearing on Ortiz's motion for a further award of attorney fees and costs, the trial court adopted its tentative ruling in favor of Ortiz. Before a written order was filed, Laue filed a motion for an order setting aside this new award of attorney fees and costs pursuant to section 663 (authorizing motion to set aside and vacate judgment and enter different judgment).

In its written order filed on February 10, 2016 (following the January 28, 2016 hearing), the trial court formally awarded attorney's fees and costs of $5,605 to Ortiz. In making the order, the court relied upon sections 425.16(c)(l) and 685.040. (See *ante*, fn. 5.) This is the order challenged on appeal.

Subsequently, Ortiz filed opposition to Laue's motion to set aside the third award of attorney fees and costs and requested an additional award of attorney fees and costs against Laue. By order filed April 18, 2016, the trial court denied Laue's set-aside motion and ordered Laue to pay attorney fees and costs of $1,250 to Ortiz.

On April 25, 2016, Laue filed a notice of appeal, appealing from the February 10, 2016 order awarding attorney fees and costs of $5,605.[7]

Both Laue's notice of appeal and his "Civil Case Information Statement" filed in this court indicate that he is purportedly appealing from an order made after judgment pursuant to section 904.1, subdivision (a)(2). However, the statement of appealability in Laue's opening brief indicates that he is appealing under the collateral order exception to the final judgment rule, citing *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751 (*Singletary*).

II

Discussion

We directed the parties to submit supplemental briefs that (1) identified in the appellate record any judgment of dismissal or written order of dismissal (see § 581d), (2) discussed the collateral order exception to the one final judgment rule and identified any pending "main issue" that was collateral to the February 10, 2016 award, and (3) addressed why this appeal should not be dismissed on the court's own motion as an appeal from a nonappealable order.

"The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.) A trial court's order is appealable only when made so by statute. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.)" (*Doe v. Luster* (2006) 145 Cal.App.4th 139, 145 (*Doe*).) "A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment. [Citations.]" (*Griset v. Fair Political Practices Com.*, *supra*, at p. 696.) "A reviewing court must raise the issue [of appealability] on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of

[7] The appellate record in this case does not reflect that Laue filed a notice of appeal from April 18, 2016 award of attorney fees and costs of $1,250.

Civil Procedure section 904.1. [Citations.]" (*Jennings v. Marralle*, *supra*, at pp. 126-127.)

Section 904.1, subdivision (a)(13) provides for an appeal "[f]rom an order granting or denying a special motion to strike under Section 425.16." (See § 425.16, subd. (i) ["An order granting or denying a special motion to strike shall be appealable under Section 904.1."].) In *Doe*, after prevailing against an anti-SLAPP motion, the plaintiff brought a motion for attorney fees under section 425.16. (*Doe*, *supra*, 145 Cal.App.4th at p. 142.) The trial court denied the motion, and the plaintiff appealed. (*Ibid*.) The plaintiff's appeal was dismissed because the court's subsequent, separate order denying attorney fees was not appealable under sections 904.1, subdivision (a)(13), and 425.16, subdivision (i). (*Doe*, *supra*, at pp. 145-150.)

Section 904.1, subdivision (a)(2), states that an appeal may be taken "[f]rom an order made after a *judgment* made appealable by paragraph (1)" of subdivision (a). (Italics added.) But section 904.1, subdivision (a)(2), does not say that an appeal may be taken from an order made after *an order* made appealable by a different paragraph of subdivision (a).

We are not convinced that an order granting an anti-SLAPP motion but not expressly dismissing the action meets the requirements of section 581d and constitutes a final judgment. An ensuing judgment of dismissal disposing of the action is the judgment in such circumstances. (See §§ 577, 581d; cf. *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1816 ["An order granting a motion for summary judgment is not an appealable order or judgment. [Citations.]"]; *Lavine v. Jessup* (1957) 48 Cal.2d 611, 614 ["An order sustaining a demurrer without leave to amend is nonappealable, and the appeal must be taken from the ensuing judgment. [Citation.]"]; *Berri v. Superior Court* (1955) 43 Cal.2d 856, 859-860 ["where there has been a judgment of dismissal after demurrer sustained without leave to amend or leave to amend is granted but plaintiff fails to amend within the time allowed, the action is finally

terminated by the judgment"; a trial court may reconsider its ruling after sustaining a demurrer without leave to amend but before judgment].)

The written order granting Ortiz's anti-SLAPP motion, filed November 18, 2013, did not order dismissal of the action (see § 581d). While the November 18, 2013 order granting the anti-SLAPP motion was made appealable by statute (§ 904.1, subd. (a)(13)), neither party has identified in the appellate record any ensuing judgment of dismissal or written order of dismissal. In the absence of a judgment or a written order of dismissal, the February 10, 2016 order cannot be *an order after judgment*, which would be appealable. (§ 904.1, subd. (a)(2).)

We also conclude that the challenged attorney fee and cost award was not a final order collateral to the continuing litigation of the main issues. The Supreme Court has explained that "where there is a final determination of some collateral matter distinct and severable from the general subject of the litigation, even though litigation of the main issues continues, an appeal nevertheless is authorized. [Citation.]" (*Southern Pacific Co. v. Oppenheimer* (1960) 54 Cal.2d 784, 786.)

In *In re Marriage of Skelley* (1976) 18 Cal.3d 365 (*Skelley*), a dissolution case in which the wife appealed from the superior court's order reducing temporary spousal support and denying attorney fees, the Supreme Court applied the collateral order exception to the one final judgment rule to review the issues. (*Id.* at p. 367.) In *Skelley*, the Supreme Court described the collateral order exception: "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citations.] This constitutes a necessary exception to the one final judgment rule. Such a determination is substantially the same as a final judgment in an independent proceeding. [Citations.]" (*Id.* at p. 368; see *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119, but see *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 899-904.)

In *Singletary*, an anti-SLAPP case, the "trial court granted Singletary's anti-SLAPP motion as to the City's fourth cause of action (unfair business practices) and the sixth cause of action (injunctive relief), but [it] denied the motion in all other respects. (Code Civ. Proc., § 425.16.) The trial court awarded Singletary $5,750 for attorney's fees, and $80 for costs." (*Singletary*, *supra*, 206 Cal.App.4th at p. 757, fn. omitted.) The Court of Appeal, Fourth Appellate District, Division Two, determined that "since the attorney fee order is (1) independent of the main causes of action, and (2) involves the payment of money by the appellant, . . . it qualifies for the collateral order exception, and is directly appealable." (*Id*. at p. 782.)

This case is distinguishable from *Singletary* in that the trial court granted Ortiz's anti-SLAPP motion as to *all* causes of action, whereas in *Singletary* the court granted an anti-SLAPP motion as to only two out of six causes of action and four causes of action remained to be addressed in the ongoing litigation. (See *Singletary*, *supra*, 206 Cal.App.4th at p. 757.) In this case, the February 10, 2016 award of attorney fees and costs in the amount of $5,605, from which Laue purports to appeal, was not collateral to the continuing litigation of some other "main" issue.

Laue has not offered any cogent legal basis why this appeal should not be dismissed on this court's own motion as an appeal from a nonappealable order.[8] A purported appeal from a nonappealable order must be dismissed on this court's own motion. (See *Cole v. Rush* (1953) 40 Cal.2d 178 (*per curiam*); *Collins v. Corse* (1936) 8

[8] An order awarding attorney fees of more than $5,000 to a prevailing *plaintiff* under section 425.16(c)(1), pursuant to section 128.5 (sanctions), on the ground that the defendant's anti-SLAPP motion was "frivolous or . . . solely intended to cause unnecessary delay" (§ 425.16, subd. (c)) is immediately appealable pursuant to section 904.1, subdivision (a)(12), which provides that an appeal may be taken "[f]rom an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." (See *Doe*, *supra*, 145 Cal.App.4th at p. 146.)

Cal.2d 123, 124.) Accordingly, we cannot reach the merits of his appellate claims but rather must dismiss the appeal.

Appeal in Second Lawsuit: H043206

By order filed November 20, 2015 in CV284013, the trial court granted Ortiz's anti-SLAPP motion that targeted five of the complaint's nine causes of action[9] and denied Laue's motion for an order to allow him to continue with discovery notwithstanding the statutory stay of discovery. (See § 425.16, subds. (a), (b), (e), (g).) On appeal Laue contends that the trial court should have (1) granted his motion to conduct limited discovery "for good cause shown" (§ 425.16, subd. (g) (hereafter § 425.16(g)), (2) denied Ortiz's anti-SLAPP motion, and (3) found that Ortiz's anti-SLAPP motion was frivolous and intended to cause unnecessary delay and awarded attorney fees and costs to him (§ 425.16(c)(1)). More specifically as to the complaint's ninth cause of action for intentional infliction of emotional distress, Laue essentially asserts that the trial court should not have struck the cause of action because it was predicated on allegations of unprotected activity as well as protected activity, citing *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*). He asks this court to reverse the order granting Ortiz's anti-SLAPP motion and award him attorney fees and costs (§§ 425.16(c)(1), 128.5) and any other proper relief.

In light of the clarifying decision of *Baral*, which was decided after the November 20, 2015 order, we conclude that the trial court should not have struck the ninth cause of action in its entirety but only the claim for intentional infliction of emotional distress based on activity protected by section 425.16. We otherwise find Laue's contentions without merit. Accordingly, we reverse the order granting the anti-SLAPP motion for a limited correction of the order granting Ortiz's anti-SLAPP motion. We otherwise find

[9] The five targeted causes of action were libel, slander, intentional interference with economic advantage, negligent interference with economic advantage, and intentional infliction of emotional distress causes of action.

no error. Upon remand, the trial court shall correct its order with respect to the complaint's ninth cause of action by striking the ninth cause of action's claim for intentional infliction of emotional distress based on activities protected by section 425.16 and its corresponding allegations. But the court shall leave intact the ninth cause of action's claim for intentional infliction of emotional distress based upon purely unprotected activity and its corresponding allegations.

I

Procedural History

On August 5, 2015, Laue in propria persona filed a complaint for damages, which set forth nine causes of action: libel, slander, intentional interference with economic advantage, negligent interference with economic advantage, invasion of privacy, stalking, private nuisance," trespass to timber" or "trespass to shrubs", and intentional infliction of emotion distress. As indicated, the action was brought against Ortiz and Doe defendants.

The complaint alleged the following facts among others. Ortiz had installed closed circuit television (CCTV) cameras under the eaves of her house and they were directed at Laue's second-story bedroom and bathroom windows, his driveway, and most of his backyard. On or about August 26, 2013, Laue's attorney sent a letter to Ortiz's attorney demanding the removal of the cameras within 10 days and warning Ortiz that she would "face further legal action" if she did not remove the CCTV cameras that she had installed. Ortiz's attorney responded to Laue's attorney by letter, dated September 13, 2013. The September 13, 2013 letter contained false statements concerning Laue. The complaint alleged on information and belief that Ortiz "distributed this letter to third parties to further defame [Laue's] reputation." Subsequently, Ortiz sent a letter, dated July 30, 2014, to Laue's landlord, which contained false and defamatory accusations against Laue. The three letters were attached as exhibits to the complaint.

The complaint's first two causes of action (libel and slander) were based on the allegedly false statements, either written or oral, about Laue, and the second two causes

of action (intentional and negligent interference with economic advantage) were based on the allegedly false statements about Laue to his landlord. The ninth cause of action (intentional infliction of emotional distress) was based in part on allegedly false statements concerning Laue: "Defendant knew prior to making false statements of and concerning the Plaintiff, that Plaintiff had been renting the property from his landlord. Defendant also knew that making such false statements would cause the Plaintiff and his family to suffer extreme emotional distress." The ninth cause of action was also based on Ortiz's alleged installation of CCTV cameras to monitor Laue's home.

Pursuant to section 425.16, Ortiz moved to strike the first, second, third, fourth, and ninth causes of action and requested attorney fees. In her supporting declaration, she explained the geneses of the letter sent by her attorney to Laue's attorney in September 2013 and the letter sent by her to Laue's landlord in July 2014. In the declaration, she said: "As a result of [Laue's] conduct over the years, I have been required to report him to the police on several occasions and to even file a [s]mall [c]laims action against his landlord as a result." She indicated that in May 2013, she sent a complaint letter to Laue's landlord concerning Laue's conduct, and she filed a small claims action, which settled in mediation. According to her declaration, in 2013 in CV250570, Laue filed a first amended complaint against her.

In her declaration, Ortiz further stated: "During the pendency of the first lawsuit against me, I received a letter from Mr. Laue's attorney, . . . dated August 26, 2013. . . . The letter accused me of invasion of privacy and stalking Mr. Laue. The letter specifically alleged that I installed one or more CCTV cameras directed towards Mr. Laue's bedroom and/or bathroom window. The letter concluded that if I failed to remove the CCTV cameras allegedly directed at Mr. Laue's home or yard area within ten days, it would 'result in legal further [*sic*] action by [Mr. Laue].' " She stated: "Since the allegations were false, and in particular there were no CCTV cameras on my property directed towards Mr. Laue's bedroom and/or bathroom window, but rather the common

boundary between our properties, I sent the letter to my attorney . . . and asked him to respond. [My attorney] responded with the letter dated September 13, 2013 . . . . I believed that if I did not have my attorney respond to [his attorney's] letter, that [his attorney] would indeed sue me, as he threatened to do in his letter, and that he and his client, Mr. Laue, would attempt to use the absence of a response as evidence against me. *I authorized* [*my attorney*] *to write the letter in anticipation of additional litigation by Mr. Laue and his attorney against me*. In fact, Mr. Laue is currently suing me in this action based upon the same activities alleged in the letter: allegations that I 'stalked' Mr. Laue and allegations that I installed CCTV cameras directed towards Mr. Laue's bedroom and/or bathroom window. (Fifth and Sixth Causes of Action.)" (Italics added.) Copies of the August 26, 2013 letter and the September 13, 2013 letter, declared to be true and correct were attached as exhibits to her declaration.

According to Ortiz's declaration, "During the pendency of the first lawsuit, including Mr. Laue's appeal, Mr. Laue . . . continued to video record me in my yard when he had an opportunity, peeked through the blinds of my house at me and my guests, bent the bottom of our common fence inward toward my property by jamming rocks under it, flung weeds at my property in connection with his wacking them [*sic*], and planted a deciduous tree near the property line, which I expect will cause debris on my property and the roots to spread causing damage to my property." She stated in the declaration: "I therefore sent another letter to plaintiff's landlord . . . , dated July 30, 2014, concerning these activities and advising her that if they persisted, that she may incur a liability to herself." She also said: "I wrote the letter . . . because I was advised and believed that I would have to put the landlord on notice of these conditions in order to sue her and the tenant, Mr. Laue, for the damage caused to me and my property. I understood that I needed to advise the landlord of these conditions and actions in order to give her notice of those issues and for her to have liability for them. I also wrote the letter to make a demand on [Laue's landlord] to resolve the issues so that litigation could

be avoided." Ortiz further stated: "I therefore wrote the July 30, 2014 letter to Mr. Laue's landlord in preparation for and *in anticipation of a lawsuit against her relating to Mr. Laue's conduct as stated in the letter*. At the time I sent the letter to [Laue's landlord], I intended to file such a lawsuit in the near future if Mr. Laue's conduct did not stop." (Italics added.) She explained: "[A]fter consultation with counsel, I decided to hold off on immediately filing the suit in light of the anticipated costs of suit and in the hopes that the issues could be resolved short of litigation."

By notice filed October 14, 2015, Laue moved for permission to conduct limited discovery. In support of the motion, Laue argued that Ortiz had "never had any valid cause of action against [him] or his landlord" and that Ortiz made "her claim(s) as a pretext to escape liability through abuse of an anti-SLAPP motion." Laue requested an order compelling Ortiz to answer the discovery requests served upon her on September 12, 2015. He represented that those requests were "mostly related to Defendant's July 30, 2014 letter." Laue further contended that "[m]erely claiming that the July 30, 2014 letter was written 'in preparation for and in anticipation of a lawsuit' [did] not make it so." He maintained that discovery was needed to determine whether Ortiz's July 30, 2014 letter fell within the litigation privilege. He argued that good cause for discovery existed because Ortiz controlled the evidence that he needed "to make out a prima facie case" and Ortiz "must have some physical evidence in her possession to support one or more causes of action against [him] and/or his landlord."

Laue's declaration focused on Ortiz's alleged dishonesty, maliciousness, and vindictiveness. Laue indicated that in response to Ortiz's July 30, 2014 letter, his landlord sent her a letter that asked for proof of her claim, and he attached a copy of his landlord's letter to his declaration. In his declaration, Laue stated, "Ms. Ortiz never responded [to his landlord's letter]. . . . If Ms. Ortiz intended to file a lawsuit as she stated, then she must have some kind of tangible evidence to support a cause of action.

Ms. Ortiz has provided no evidence to support her statements, to my landlord or to this Court." Laue queried why Ortiz had not responded.

Ortiz argued in her opposition that Laue's request for limited discovery was untimely and not supported by a showing of good cause.

Laue requested that the trial court take judicial notice of court records, including three records filed in what appears to be an unrelated family law case and four records filed in CV250570.

In written objections filed on October 29, 2015, Ortiz objected to the three exhibits attached to Laue's memorandum of points and authorities on the grounds that they were not properly authenticated and lacked foundation. The exhibits included (1) Ortiz's letter to Laue's landlord, dated July 30, 2014, and an envelope postmarked August 2, 2014; (2) an email to Laue from his landlord, dated August 5, 2014, with an attached pdf letter; and (3) the "details" of a pdf file purportedly showing that Laue first downloaded Ortiz's letter on August 6, 2014, at 7:44 a.m.

By order filed on November 20, 2015, the trial court denied Laue's request for judicial notice as to the three family law filings on the ground of irrelevancy. The court granted the request for judicial notice of "the existence and content" of the four specified court records filed in CV250570 but did not take judicial notice of "the truth of hearsay statements or factual findings therein." The court sustained Ortiz's lack of foundation objections to the three exhibits attached to Laue's memorandum. The court determined that Ortiz had satisfied her burden with respect to each of the targeted causes of action by demonstrating that the challenged claims arose from protected activity. It also concluded that Laue had failed to demonstrate a probability of success on any of the causes of action, especially in light of the litigation privilege. The trial court granted Ortiz's anti-SLAPP motion.

In the same November 20, 2015 order, the court also denied Laue's request for permission to conduct limited discovery on the ground that he failed to demonstrate good

cause for further discovery (see § 425.16(g)). The order denied Ortiz's request for attorney fees without prejudice to a future request. It denied Laue's request for attorney fees, finding that the anti-SLAPP motion was neither frivolous nor intended to cause delay. (See § 425.16(c)(1).)

On January 12, 2016, Laue filed a notice of appeal from the November 20, 2015 order. (See § 425.16, subd. (i), 904.1, subd (a)(13).)

II

Discussion

A. *Anti-SLAPP Motion*

1. *Governing Law*

Section 425.16, subdivision (b)(1), provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Where a pleaded cause of action alleges both protected and unprotected activity—a so-called "mixed cause of action"—"the proper subject" of anti-SLAPP motion is only the claim "based on the conduct protected by the statute." (*Baral, supra*, 1 Cal.5th at p. 382.)

"The procedure made available to defendants by the anti-SLAPP statute has a distinctive two-part structure. [Citations.] A court may strike a cause of action only if the cause of action (1) *arises from* an act in furtherance of the right of petition or free speech 'in connection with a public issue,' and (2) the plaintiff has not established 'a probability' of prevailing on the claim. [Citation.]" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 619-620, italics added (*Rand Resources*).) " 'Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to

being stricken under the statute.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278-279 (*Soukup*).)

We independently review the trial court's order granting an anti-SLAPP motion under section 425.16. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055 (*Rusheen*).) In conducting this de novo review, this court, like the trial court, considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); see *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326 (*Flatley*).) We do not weigh credibility or compare the weight of the evidence. (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3.)

2. *Evidentiary Issues*

a. *Exhibits Attached to Laue's Memorandum of Points and Authorities*

As indicated, Ortiz objected to the exhibits attached to Laue's memorandum of points and authorities on a number of grounds, including the failure to show personal knowledge and lack of authentication. The trial court sustained Ortiz's objections for lack of foundation. On appeal, without any substantive argument or citation of legal authorities, Laue asserts that he did lay an adequate foundation for the three exhibits attached to his memorandum and that they constituted prima facie evidence that his defamation claim was not barred by the statute of limitations as argued by Ortiz.[10]

[10] In a footnote in his opening brief, Laue states that this court can make a factual finding of admissibility pursuant to section 909, which states in part: "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court." Laue has not properly filed and served a motion pursuant to section 909 requesting that this court to take evidence and make proposed factual findings. (See Rules 8.54, 8.252(b).) Moreover, he has not shown that the exercise of authority under section 909 to make preliminary fact determinations (see Evid. Code, § 403) would be appropriate. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [" '*Absent exceptional circumstances, no* [*section 909*] *findings should be made*' "].)

In the second step of an anti-SLAPP inquiri, [a] plaintiff's claim may not be struck under the anti-SLAPP statute if the plaintiff has presented *admissible* evidence that, if believed by the trier of fact, would support it. (See *Baral, supra,* 1 Cal.5th at p. 396; *Taus v. Loftus* (2007) 40 Cal.4th 683, 729.) At this stage, a plaintiff must present competent admissible evidence. (*Sweetwater Union High School Dist. v. Gilbane Building Co*. (2019) 6 Cal.5th 931, 940 (*Sweetwater*).) Laue has not shown that he submitted an affidavit or declaration, under penalty of perjury, identifying and authenticating the three exhibits and laying a foundation for their admissibility based on his personal knowledge. (See § 425.16, subd. (b)(2) [the court shall consider "supporting and opposing affidavits"]; Evid. Code, §§ 702 [personal knowledge requirement], 1400 [definition of "authentication"], 1401, subd. (a) ["Authentication of a writing is required before it may be received in evidence"]; see also § 2015.5.)

"The determination regarding the sufficiency of the foundational evidence is a matter left to the court's discretion. [Citation.] Such determinations will not be disturbed on appeal unless an abuse of discretion is shown. [Citations.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 47.) Laue has not demonstrated that the trial court abused its discretion in sustaining the objections to those three exhibits.

b. *Partial Denial of Laue's Request for Judicial Notice of Documents*

Laue requested that the trial court take judicial notice of three filings in a family law case between Ortiz and her former husband. The trial court sustained Ortiz's relevancy objections.

Laue argues that the three family law filings were relevant to Ortiz's lack of credibility and her "motive and intent to 'get even' with anyone who disagrees with her." Laue has not shown that the evidence was relevant in the context of an anti-SLAPP motion. "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2))." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821

(*Wilson*), superseded by statute on another ground as stated in *Hart v. Darwish* (2017) 12 Cal.App.5th 226, fn. 3.) But the court "does not *weigh* the credibility or comparative probative strength of competing evidence" (*ibid*.) or "decide disputed questions of fact." (*Id*. at p. 822.) Laue has not established that the trial court abused its discretion by refusing to take judicial notice of those documents. (See *People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2 ["any matter to be judicially noticed must be relevant to a material issue"]; Evid. Code, § 210.)

c. *Alleged Lack of Opportunity to Respond*

In passing, Laue argues that he did not have a fair opportunity to respond to the foregoing evidentiary objections because Ortiz served her objections on him only five court days before the scheduled November 5, 2015 hearing on Ortiz's anti-SLAPP motion. The hearing was not actually held until November 10, 2015. The record does not reflect that Laue raised that objection below, even though it appears he had ample opportunity to do so. We deem this argument forfeited on appeal since it has not been developed by any further argument or supported by any legal authorities. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*); Rule 8.204(a)(1)(B).)

3. *First Step: Protected Activity*

On appeal, Laue does not dispute that the September 13, 2013 letter from Ortiz's counsel to Laue's attorney was a prelitigation communication within the category described in subdivision (e)(2) of section 425.16.[11] Ortiz's declaration makes clear that

[11] At the hearing on the anti-SLAPP motion, Laue claimed that the September 2013 letter was irrelevant to the anti-SLAPP analysis and that his complaint included allegations concerning it only to show Ortiz's "stated reasons . . . for installing the CCTV cameras . . . ." Although the trial court recognized that Laue was then arguing that the challenged claims were not based on September 2013 letter, the court concluded that "[t]he challenged claims [arose], in large part if not entirely, from [Ortiz's] attorney's September 2013 letter to [Laue] and/or from [Ortiz's] July 2014 letter to [Laue's] landlord." Its order granting Ortiz's anti-SLAPP motion stated: "In support of her motion, [Ortiz] declares that both of these letters were sent in anticipation of litigation arising from the parties' various disputes. . . . The content of the letters supports [Ortiz's]

the letter was in response to a threat of further litigation by Laue's attorney on behalf of Laue and that she authorized her counsel's letter in anticipation of additional litigation by Laue.

Ortiz's declaration in support of the anti-SLAPP motion asserts that at the time she wrote the July 30, 2014 letter to Laue's landlord, she was "seriously contemplating litigation in the near future against Mr. Laue and his landlord" and that the letter was written "in preparation for and in anticipation of a lawsuit against her relating to Mr. Laue's conduct." By the time of Ortiz's July 2014 letter, Laue had already sued Ortiz (CV250570), Ortiz had filed and settled a small claims action against Laue's landlord, and Ortiz had received the August 2013 letter threatening further legal action from Laue's lawyer.

Laue disputes Ortiz's assertion that she wrote her July 30, 2014 letter in anticipation of litigation. Citing *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251 (*Action Apartment*), Laue maintains that whether a prelitigation communication relates to litigation that was contemplated in good faith and under serious consideration is an issue of fact.[12] Laue contends that the trial court should

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declaration. . . . Finally, the parties' history of litigation—including a prior small claims lawsuit that [Ortiz] filed against [Laue's] landlord . . . and the existence of the present action itself support the conclusion that the letters were sent in anticipation of further litigation." On appeal, Laue asserts that the September 2013 letter should be disregarded as irrelevant. We reject his suggestion because in evaluating an anti-SLAPP motion, a court focuses on the pleadings and the affidavits and declarations. (See §§ 425.16, subd. (b)(2), 2015.5; *Sweetwater, supra*, 6 Cal.5th at p. 941.)

[12] The California Supreme Court did state in *Action Apartment* that "[w]hether a prelitigation communication relates to litigation that is contemplated in good faith and under serious consideration is an issue of fact." (*Action Apartment, supra*, 41 Cal.4th at p. 1251.) In that case, the trial court had sustained a demurrer to a class action complaint challenging a section of the City of Santa Monica's Tenant Harassment ordinance without leave to amend. (*Id*. at pp. 1237, 1239-1240.) The challenged section "prohibit[ed] a landlord from maliciously serving a notice of eviction or bringing any action to recover possession of a rental unit without a reasonable factual or legal basis." (*Id*. at p. 1239.) The appellate court reversed, holding that the litigation privilege

not have accepted Ortiz's self-serving statements without some supporting evidence. He complains that Ortiz did not state any valid legal theory for suing him or identify her potential causes of action and that the record does not reflect evidence of a valid cause of action.

"A defendant satisfies the first step of the analysis by demonstrating that the 'conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16]' [citation], and that the plaintiff's claims in fact *arise* from that conduct [citation]." (*Rand Resources*, *supra*, 6 Cal.5th at p. 620.) For purposes of the anti-SLAPP statute, the phrase " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes . . . any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(2).)

Even though the litigation privilege and the anti-SLAPP statute "serve quite different purposes" (*Flatley*, *supra*, 39 Cal.4th at p. 322), courts "have looked to the litigation privilege as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry." (*Id*. at pp. 322-

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preempted the entire section. (*Id*. at p. 1240.) But the Supreme Court framed the issue as "whether and to what extent the litigation privilege of Civil Code section 47, subdivision (b), conflict[ed] with and thus preempt[ed]" the challenged section. (*Id*. at p. 1237.) The Supreme Court concluded: "Because a factual inquiry is required in order to determine whether a particular eviction notice is privileged, the Court of Appeal erred in its holding that this provision . . . is entirely preempted by the litigation privilege. This provision is preempted only to the extent that it actually conflicts with the litigation privilege. [Citations.] That is, this provision . . . conflicts with, and is preempted by, the litigation privilege to the extent it prohibits, criminalizes, and establishes civil penalties for eviction notices where litigation is contemplated in good faith and under serious consideration. Accordingly, we reverse the Court of Appeal's judgment to the extent that it directs the superior court to enter a judgment declaring that [the challenged section] is preempted by the litigation privilege." (*Id*. at p. 1252, fn. omitted.)

323.) The litigation privilege, codified at Civil Code section 47, subdivision (b), is "not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. [Citation.]" (*Rusheen, supra,* 37 Cal.4th at p. 1057.) "A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration. [Citations.]" (*Action Apartment, supra,* 41 Cal.4th at p. 1251.) Nevertheless, the litigation privilege has been broadly interpreted to afford " 'the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]' [Citation.]" (*Id.* at p. 1241.)

Courts have concluded that " 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding' " are protected by section 425.16. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (*Briggs*); see *Flatley, supra,* 39 Cal.4th at p. 322, fn. 11.) For example, in *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777 (*Dove Audio*), the plaintiff filed an action "seeking damages for libel and for interference with economic relationship" (*id.* at p. 780) after the defendant law firm sent a letter to celebrities who had participated in the making of a record for the benefit of designated charities. (*Ibid.*) The letter solicited their support for the filing of a complaint with the state attorney general to request an investigation into the plaintiff's "alleged underpayment of royalties to their designated charities." (*Id.* at p. 781.) The court determined that the letter came within the protection of section 426.15 as an act in furtherance of the constitutional right of petition. (*Dove Audio, supra,* at 784.)

"Correspondence 'made "in anticipation of litigation 'contemplated in good faith and under serious consideration' " ' can be a petitioning activity protected by the anti-SLAPP statute. (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268.)" (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 472.) "Prelitigation letters demanding that a party cease from doing certain acts or be subject to a lawsuit based on that conduct

are in preparation or anticipation of litigation and fall within the protection of section 425.16, subdivision (e)(2) as 'written or oral statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body.' (See *Gotterba v. Travolta* [(2014)] 228 Cal.App.4th [35,] 38, 41.)" (*Ibid*.)

A "defendant's initial burden in invoking the anti-SLAPP statute is to make ' "a threshold showing that the challenged cause of action [or claim] is one arising from protected activity." ' [Citation.]" (*Soukup, supra*, 39 Cal.4th at p. 286.) "There is no further requirement that the defendant initially demonstrate his or her exercise of constitutional rights of speech or petition was valid as a matter of law. [Citation.]" (*Ibid*.) "Once that burden is met, the burden shifts to the opposing party to demonstrate the 'probability that the plaintiff will prevail on the claim.' [Citations.]" (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)

In the narrow circumstance "where a defendant brings a motion to strike under section 425.16 . . . , but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley, supra*, 39 Cal.4th at p. 320; see *id*. at p. 316.) "If, however, a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Id*. at p. 316.) Generally, "a defendant is not required to establish that its actions are constitutionally protected as a matter of law because such a requirement would render the second prong of the anti-SLAPP statute ' "superfluous." ' [Citation.]" (*Id*. at p. 319.)

In this case, although Laue disputes that the June 2014 letter was protected activity within the meaning of section 425.16, Ortiz did not concede, and the evidence did not conclusively establish, that the letter was illegal as a matter of law. Accordingly, we look to the litigation privilege as an aid in determining whether that communication fell within

the purview of the anti-SLAPP statute. (See *Flatley*, *supra*, 39 Cal.4th at pp. 322-323.) It may be reasonably inferred from Ortiz's declaration that her attorney's September 2013 letter and her July 2014 letter to Laue's landlord were prelitigation communications that related to litigation that was being contemplated in good faith and under serious consideration. Consequently, we conclude in step one that the letters fell within the scope of subdivision (e)(2) of section 425.16. That is enough to satisfy the threshold showing required for an anti-SLAPP motion. (See *Action Apartment*, *supra*, 41 Cal.4th at p. 1251; *Briggs*, *supra*, 19 Cal.4th at p. 1115.)

Laue has presented no authority establishing that Ortiz was required to provide evidence that the she had specific, meritorious causes of action against him in step one. Although Laue called into question Ortiz's intention in writing the July 2014 letter, any factual dispute is not "resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley, supra,* 39 Cal.4th at p. 316.)

Accordingly, we turn to step two of the anti-SLAPP analysis.

4. *Second Step: Probability of Prevailing*

Once Ortiz made the requisite threshold showing that a claim arose from activity within the scope of section 425.16, the burden shifted to Laue to establish a probability of prevailing on the merits. Laue was required to demonstrate that the challenged claims had at least "minimal merit." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 94.) In evaluating whether a plaintiff has made the requisite showing in step two, a court accepts the plaintiff's evidence as *true* and then determines if the defendant's evidence "defeats the plaintiff's showing as a matter of law. [Citation.]" (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420; see *Baral*, *supra*, 1 Cal.5th at p. 385.) "[T]he trial court does not make factual findings in ruling on an anti-SLAPP motion. [Citations.]" (*All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal.App.4th 1186, 1199.)

The litigation privilege is "relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense [that] a plaintiff must overcome to demonstrate a probability of prevailing. (See, e.g., *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 926-927 [where plaintiff's defamation action was barred by Civil Code section 47, subdivision (b), plaintiff cannot demonstrate a probability of prevailing under the anti-SLAPP statute]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783-785 [The defendant's prelitigation communication was privileged and trial court therefore did not err in granting motion to strike under the anti-SLAPP statute].)" (*Flatley, supra*, 39 Cal.4th at p. 323.) In opposition to the anti-SLAPP motion, Laue offered no evidence that Ortiz had not sent her July 2014 letter in good-faith anticipation of litigation against him and his landlord. He did not provide any evidence to overcome the litigation privilege with respect to either the September 2013 letter or the July 2014 letter.

"Although originally enacted with reference to defamation" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*); see Civ. Code, § 44), the litigation privilege has " 'been held to immunize defendants from tort liability based on theories of abuse of process [citations], intentional infliction of emotional distress [citations], intentional inducement of breach of contract [citations], intentional interference with prospective economic advantage [citation], negligent misrepresentation [citation], invasion of privacy [citation], negligence [citation] and fraud [citations].' [Citation.]" (*Action Apartment, supra*, 41 Cal.4th at p. 1242.) "[T]he litigation privilege bars all tort causes of action except malicious prosecution. [Citations.]" (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 960.)

Except where otherwise statutorily provided, the litigation privilege applies "to *all* publications, irrespective of their maliciousness." (*Silberg, supra*, 50 Cal.3d at p. 216; cf. Civ. Code, § 47, subd. (b)(1).) " 'It is important to distinguish between the lack of a good faith intention to bring a suit and publications which are made without a good faith

belief in their truth, i.e., malicious publications. The latter, when made in good faith anticipation of litigation, are protected as part of the price paid for affording litigants the utmost freedom of access to the courts. . . .' [Citations.]" (*Action Apartment, supra*, 41 Cal.4th at p. 1251.) Fraudulent communications and perjured testimony have been held to be within the litigation privilege. (See *Silberg, supra*, at p. 218.)

Laue asserts that Ortiz made numerous false allegations about him in her July 30, 2014 letter and did not provide any evidence to corroborate her accusations. However, Laue failed to present evidence showing that the litigation privilege could be overcome and there was a probability of prevailing on the challenged claims. In addition, Laue provided no evidence that Ortiz had "distributed" the September 30, 2013 letter "to third parties to further defame [his] reputation," as alleged in his complaint.

Laue offers no legal authority to support his claim that the trial court's application of the anti-SLAPP statute did not properly balance the parties' "competing constitutional rights" "based on the facts" of this case. "The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral, supra*, 1 Cal.5th at p. 384.) " 'The right to petition is not absolute, providing little or no protection for baseless litigation' [citation]." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 64.) "[S]ection 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning." (*Id.* at p. 63.) "The anti-SLAPP remedy is not available where a probability exists that the plaintiff will prevail on the merits. (§ 425.16, subd. (b).)" (*Id.* at p. 65.) Section 425.16 "subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits (§ 425.16, subd. (b))." (*Id.* at p. 63.)

Laue did not meet his burden in step two.

5. *Striking a SLAPP claim and Supporting Allegations from a Mixed Cause of Action*

We understand Laue to be arguing, based on *Baral*, that he was not required to establish a probability of prevailing on a claim arising from activity that was not protected by the anti-SLAPP statute and that because the ninth cause of action for intentional infliction of emotional distress partly arose from unprotected activity, the trial court erred in striking that cause of action. Laue points out that the trial court recognized that the ninth cause of action arose " 'from the allegedly defamatory letters and from [Ortiz's] allegedly inappropriate installation of CCTV cameras and floodlights.' "

In its November 20, 2015 order granting Ortiz's motion to strike, the court explained its reasoning with respect to the ninth cause of action. It stated: "[The complaint's] ninth cause of action arises both from the allegedly defamatory letters and from [Ortiz's] allegedly inappropriate installation of CCTV cameras and floodlights. . . . While the latter theory is not subject to a defense based on the litigation privilege, [Laue] introduces no evidence supporting his allegations related to this theory. [¶] . . . [Laue] fails to carry his burden as to any portion of the claims at issue."

Months after Laue filed his notice of appeal in this case, the California Supreme Court decided *Baral*, which clarified how an anti-SLAPP motion "operate[s] against a so-called 'mixed cause of action' that combines allegations of activity protected by the statute with allegations of unprotected activity." (*Baral*, *supra*, 1 Cal.5th at p. 381.) Ortiz acknowledges that under *Baral*, an "anti-SLAPP motion need not address what the complaint alleges as an *entire* cause of action, and may seek to strike only those portions which describe[] protected activity." She does not, however, address Laue's argument concerning the complaint's ninth cause of action and merely asserts that the trial court correctly struck that cause of action.

In *Baral*, the Supreme Court observed that the difficulty in applying section 425.16 to mixed causes of action arose "from the statute's use of the term 'cause of action,' which has various meanings." (*Baral*, *supra*, 1 Cal.5th at p. 381.) The term

may refer to a complaint's "distinct claims for relief as pleaded in a complaint" and set out in causes of action (*ibid*.) or it may refer "to a legal claim possessed by an injured person, without reference to any pleading." (*Ibid*.) The Supreme Court disagreed with the appellate court, which had "held that an anti-SLAPP motion must be brought against a mixed cause of action in its entirety." (*Id*. at p. 382.)

The Supreme Court in *Baral* concluded: "[T]he Legislature used 'cause of action' in a particular way in section 425.16(b)(1), targeting only claims that are based on the conduct protected by the statute. Section 425.16 is not concerned with how a complaint is framed, or how the primary right theory might define a cause of action. While an anti-SLAPP motion may challenge any claim for relief founded on allegations of protected activity, *it does not reach claims based on unprotected activity*." (*Baral, supra*, 1 Cal.5th at p. 382, italics added.) It found that the form of the complaint is not determinative. (*Id*. at p. 395.)

Baral clarified: "At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage." (*Baral, supra*, 1 Cal.5th at p. 396.)

Baral further established: "If the [trial] court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim *based on protected activity* is legally sufficient and factually substantiated." (*Baral, supra*, 1 Cal.5th at p. 396, italics added.) "[W]hen the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity." (*Id*. at p. 392.) "[I]n cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish

a probability of prevailing on any claim for relief based on allegations of *protected activity*. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken. Neither the form of the complaint nor the primary right at stake is determinative." (*Id*. at p. 395, italics added; see *id*. at p. 382, fn. 2.)

Baral explained that if the plaintiff's showing in the second step would be insufficient to sustain a favorable judgment, even if the trier of fact were to accept it as true, the SLAPP claim must be struck. (*Baral*, *supra*, 1 Cal.5th at p. 396.) In addition, the "[a]llegations of protected activity supporting the stricken claim" must be "eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Ibid*.) However, "[a]ssertions [in a complaint] that are 'merely incidental' or 'collateral' are not subject to section 425.16. [Citations.] Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Id.* at p. 394.) It is now clear that "an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded. [Citations.]" (*Id*. at p. 393.)

Since Laue did not establish a probability of prevailing on his claim of intentional infliction of emotional distress that allegedly arose from the prelitigation communications, that claim must be struck. But the trial court should not have struck the entire ninth cause of action since it alleged a distinct claim of intentional infliction of emotional distress arising from unprotected activity, namely Ortiz's alleged installation and use of CCTV cameras to monitor Laue's conduct.

On remand, the trial court must correct its order.

B. *Laue's Motion to Conduct Limited Discovery*

An anti-SLAPP motion automatically stays discovery subject to a court order granting permission to conduct specified discovery. (See § 425.16(g)); *Sweetwater*, *supra*, 6 Cal.5th at p. 943.) Section 425.16(g) provides: "*All discovery proceedings in the action shall be stayed* upon the filing of a notice of motion made pursuant to this

section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."[13] (Italics added.)

In a written motion pursuant to section 425.16(g), Laue requested an order to compel Ortiz "to answer the discovery requests served upon [her] on September 12, 2015" on the ground that Ortiz had falsely claimed that she had written her July 30, 2014 letter in anticipation of litigation. Laue told the court that "[o]n September 12, 2015, [he had] served Form Interrogatories-General, Requests for Admissions, and Special Interrogatories, Set One on [Ortiz]." He indicated that the requested discovery consisted of 12 interrogatories, which "mostly related" to the July 30, 2014 letter. Laue argued that good cause was established because Ortiz controlled the relevant evidence, he could not discover such evidence by alternative means, discovery was necessary to support or refute Ortiz's claim that the letter was protected by the litigation privilege, the parties were equally situated, and the request was limited and specific.

Although the trial court agreed that Laue had failed to provide adequate notice of his motion, the trial court resolved the motion on its substantive merits. In its November 20, 2014 order, the court concluded that Laue had failed to establish the requisite good cause to conduct the requested discovery because (1) he had "not specified what specific discovery he [sought]"; (2) he had not included in the record the written discovery requests that he had served on Ortiz or "state[d] which of them are relevant to the issue of [Ortiz's] intent to pursue litigation"; (3) "there [was] no record evidence that [Ortiz] did

[13] Laue asks us in essence to answer the hypothetical question whether the filing of an anti-SLAPP motion stays all discovery in a case or whether a plaintiff may pursue discovery as to any causes of action that are not targeted by the motion. "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court. [Citations.]" (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 (*People ex rel. Lynch*); see *Consolidated Vultee Air. Corp. v. United Automobile* (1946) 27 Cal.2d 859, 862-863 (*Consolidated Vultee Air. Corp.*).)

not contemplate litigation in good faith as required to support the application of the privilege," "[p]articularly given the long history of litigation over the parties' disputes"; and (4) Laue was "not entitled to discovery merely to test [Ortiz's] declaration."

The trial court's denial of Laue's discovery motion is reviewed for abuse of discretion. (*Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 617; *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 922.) This standard of review is deferential. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) "[I]t asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Ibid*; see *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1247.)

Laue now insists that his discovery motion should have been granted on due process grounds and that he had a due process right to inquire into the basis of Ortiz's claim that she had written her July 2014 letter in anticipation of litigation against him and his landlord. He claims that denial of the motion violated his due process rights.

Laue did not assert in the trial court that due process required the trial court to grant his discovery motion. Consequently, we conclude that his due process argument was preserved only insofar as any asserted abuse of discretion in ruling on his motion under section 425.16(g) had the additional legal consequence of violating due process. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 880-881 [a constitutional right may be forfeited by the failure to timely assert it]; *In re S.B.* (2004) 32 Cal.4th 1287, 1293 ["reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court"]; cf. *People v. Partida* (2005) 37 Cal.4th 428, 435 [an appellant may raise a narrow due process argument that an evidentiary ruling that was erroneous on the ground raised below had the additional legal consequence of violating due process], 437-439 [same].)

In the context of section 425.16(g), "good cause" requires "a showing that the specified discovery is necessary for the plaintiff to oppose the [anti-SLAPP] motion and

is tailored to that end. [Citations.]" (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1125.) The good-cause showing should indicate the additional facts that the moving party plaintiff expects to uncover. (See *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 593 (*1-800 Contacts*); *Sipple v. Foundation For Nat. Progress* (1999) 71 Cal.App.4th 226, 247.) "Discovery may not be obtained merely to 'test' the opponent's declarations. [Citation.]" (*1-800 Contacts*, *supra*, at p. 593.)

The trial court could reasonably find that Laue failed to make an adequate showing of good cause under section 425.16(g), and it did not abuse its discretion by denying the discovery motion. Since it did not abuse its discretion under section 425.16(g), we reject Laue's due process claim.[14] (*People v. Loker* (2008) 44 Cal.4th 691, 704, fn. 7 ["No separate constitutional discussion is required, or provided, when rejection of a claim on the merits necessarily leads to rejection of any constitutional theory or 'gloss' raised for the first time here"].)

Insofar as Laue now relies on *Herbert v. Lando* (1979) 441 U.S. 153 (*Lando*) to argue that he was entitled to conduct discovery as to Ortiz's state of mind to overcome the litigation privilege, we reject the argument. In *Lando*, the Supreme Court found there was no absolute First Amendment privilege barring the public figure plaintiff's inquiry into the editorial process and state of mind of a media defendant in a defamation case. (*Lando*, *supra*, at pp. 169, 175.) That decision concerned whether the information sought was protected by a constitutional privilege. It did not establish what constitutes good cause supporting a discovery motion pursuant to section 425.16(g). "It is axiomatic that cases are not authority for propositions that are not considered. [Citation.]" (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043.)

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[14] We also note that "a 'mere error of state law' is not a denial of [federal] due process. [Citation.]" (*Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21.)

C. *Costs and Attorney Fees*

Laue asserts that this court should (1) find that Ortiz's anti-SLAPP motion was frivolous and intended to cause unnecessary delay and (2) award costs and reasonable attorney fees to him pursuant to sections 425.16(c)(1) and 128.5.

Section 425.16(c)(1) provides that, with an exception not here applicable, "in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs," but "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to *a plaintiff prevailing on the motion*, pursuant to Section 128.5." (Italics added.) Under section 128.5, subdivision (a) "[a] *trial court* may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Italics added.)

The anti-SLAPP motion was meritorious, and Laue was not a prevailing plaintiff. Accordingly, Laue is not entitled to an award of costs and reasonable attorney fees pursuant to sections 425.16(c)(1) and 128.5.

Appeal in Third Lawsuit: H043713

The appeal in H043713 (CV289248) arises from an independent action in equity based on alleged extrinsic fraud or mistake occurring in CV250570. Laue filed the action in propria persona on December 18, 2015.[15] Laue appeals from the judgment of

[15] In H043713, Laue asks this court to take judicial notice of specified documents that were filed in case No. CV250570 subsequent to issuance of the remittitur in H040705 on May 22, 2015 and before the filing of the independent action in equity on December 18, 2015. Those documents include (1) Laue's June 23, 2015 motion requesting the trial court to (a) set aside the November 18, 2013 order granting Ortiz's anti-SLAPP motion based on allegedly "uncontroverted evidence" that Ortiz committed perjury and extortion, which assertedly resulted in a fraud on the court and a miscarriage of justice; (b) set aside the March 27, 2014 order awarding attorney fees and costs to

dismissal entered after an order sustaining a demurrer (see 581d, 904.1, subd. (a)). He challenges the order sustaining Ortiz's demurrer and a prejudgment order declaring him a vexatious litigant and requiring him to furnish security to proceed with the action (see §§ 391.3, subd. (a), 391.4).

We conclude the trial court properly sustained the demurrer. Laue has not identified any reversible error. We reject Laue's request for an award of attorney fees pursuant to sections 425.16(c)(1) and 128.5 and affirm the judgment.

I

Procedural History

After filing an initial form complaint, Laue filed a first amended complaint (hereafter complaint), which was denominated an "Independent Action in Equity to Set Aside and Vacate Order Granting an Anti-SLAPP Motion Based on Extrinsic Fraud or Mistake in Case No. 1-13-CV-250570." The complaint set forth three purported causes of action: (1) intentional misrepresentation to the court, (2) negligent misrepresentation to the court, and (3) concealment from the court. Its prayer for relief asked the court to vacate the November 18, 2013 order granting Ortiz's anti-SLAPP motion and ensuing orders awarding attorney fees and costs to Ortiz in CV250570.

Ortiz as the prevailing party pursuant to section 425.16(c)(l); and (c) make several orders in his favor, including an award of costs and reasonable attorney fees (§ 425.16(c)(1)); (2) eight documents related to Laue's motion; (3) the court's order after hearing, filed July 30, 2015, denying Laue's motion and awarding further attorney fees and costs ($26,715.46) to Ortiz; and (4) the reporter's transcript of the hearing on the motion. We grant the motion and take judicial notice of the existence of the proffered documents. (See Evid. Code, §§ 452, subd. (d), 459) However, we do not take judicial notice of the truth of hearsay statements contained in those documents. (See *In re Vicks* (2013) 56 Cal.4th 274, 314; see also 2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed. 2018) Truth of Facts in Court Records, § 49.10, p. 49-8 ["Facts in the judicial record that are subject to dispute, such as allegations in affidavits [and] declarations . . . are not the proper subjects of judicial notice even though they are in a court record"].)

Ortiz demurred on the ground that the complaint failed to state a cause of action. The trial court observed that the complaint's three causes of action resembled tort claims, but it concluded that the action was an independent action in equity to set aside and vacate a judgment based upon extrinsic fraud. After finding that the complaint failed to plead facts sufficient to state a cause of action for equitable relief based on extrinsic fraud, the trial court sustained the demurrer with 10 days leave to amend.

On June 20, 2016, after Laue failed to amend the complaint within the time allowed, the trial court ordered the action to be dismissed with prejudice.

II

Discussion

A. *Demurrer*

1. *Governing Law*

"A demurrer is properly sustained when '[t]he pleading does not state facts sufficient to constitute a cause of action.' (Code Civ. Proc., § 430.10, subd. (e).)" (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.) On appeal from a judgment of dismissal challenging an order sustaining a demurrer, "[t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 (*Aubry*).) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "[I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" (*Aubry*, *supra*, at p. 967.)

"We may also consider matters that have been judicially noticed. [Citations.]" (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; see § 430.70.) " ' "[A] complaint otherwise good on its face is subject to

demurrer when facts judicially noticed render it defective." [Citation.]' [Citations.]" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

2. *The Trial Court's Ruling on the Demurrer*

In this case, the complaint alleged the following material facts, impliedly concerning CV250570. On August 2, 2013, Laue filed an action against Ortiz for libel, slander, intentional interference with economic advantage, negligent interference with economic advantage, and intentional infliction of emotional distress. On September 5, 2013, Ortiz filed an anti-SLAPP motion pursuant to section 425.16. Ortiz "knowingly committed perjury . . . in her Declaration, signed under penalty of perjury on September 5, 2013." Ortiz also "intentionally failed to disclose" certain facts, and she "intended to deceive the Court by concealing the facts."

The complaint alleged that contrary to her September 5, 2013 declaration, Ortiz made multiple false statements and reports concerning Laue to police. The complaint also alleged that in a May 17, 2013 letter to Laue's landlord, Ortiz falsely accused him of engaging in criminal activity, namely stalking, stealing, and destruction of property.

The complaint further alleged the following. The court relied on Ortiz's declaration to conclude that her reports to the police and her May 17, 2013 letter were protected under the anti-SLAPP statute. The court relied on Ortiz's September 5, 2013 declaration to find that her May 17, 2013 letter to Laue's landlord was written in anticipation of litigation. Ortiz "misled the court with false statements," which resulted in the trial court's "finding that [Ortiz's] conduct was protected under the anti-SLAPP statute."

The complaint stated that Ortiz "represented to the Court that the facts stated in her Declaration, signed under penalty of perjury on September 5, 2013, were true," but her representation was false. The complaint variously alleges that (1) Ortiz "knew that the representation was false when she made it"; (2) Ortiz "made the representation recklessly and without regard for its truth"; and (3) Ortiz "may have honestly believed"

her representation was true but she had "no reasonable grounds for believing the representation was true when she made it."

In sustaining the demurrer, the trial court concluded that complaint's factual allegations "all relate to intrinsic fraud because [Laue] alleges [Ortiz] concealed or falsified evidence during the court proceeding." The trial court also stated: "Plaintiff further appears to allege the discovery bar turns [Ortiz's alleged] perjury into extrinsic fraud, because it prevented him from fully litigating his claim. However, because the statute allows for limited discovery on motion for good cause shown (Code Civ. Proc., § 425.16, subd. (g)), [Laue] does not state facts alleging he was prevented from fully exhibiting his case. The alleged fraud occurred during the course of litigation, and [Laue] had an opportunity to litigate his claims."[16]

3. *Contentions*

Laue argues that "perjury tainting an anti-SLAPP proceeding constitutes an extrinsic fraud because the anti-SLAPP motion in effect prevents the underlying case from ever being presented in a full adversarial trial context with all the benefits of discovery and an opportunity to examine parties and witnesses to potentially impeach the credibility of their testimony." He alternatively argues that even if perjury constitutes intrinsic fraud, perjury committed in support of an anti-SLAPP motion is a proper basis to set aside an order granting the motion because unlike a full adversarial trial, the anti-SLAPP procedure does not provide the plaintiff with an opportunity to expose the perjury. We are not persuaded by those arguments.

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[16] On appeal, Laue points out that he did bring a motion to conduct further discovery pursuant to section 425.16(g) in CV284013—not in CV250570—but his motion was denied. On appeal in H043206, Laue challenges the denial of that motion. In CV250570, however, Laue did not file a motion requesting permission to conduct discovery pursuant to section 425.16(g).

4. *Demurrer Properly Sustained*

An individual "who has been prevented by extrinsic factors from presenting his case to the court may bring an independent action in equity to secure relief from the judgment entered against him. [Citations.]" (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575-576 (*Olivera*) [action to set aside default judgment entered against incompetent defendant].) Equitable relief may also be sought by motion in the same case in which the judgment was entered. (See *id*. at p. 576.) Based on equity, courts may interfere with final judgments "where the lack of a fair adversary hearing in the original action is attributable to matters outside the issues adjudicated therein which prevented one party from presenting his case to the court, as for example, where there is extrinsic fraud [citations] or extrinsic mistake. [Citations.]" (*Id*. at p. 575, see *id*. at p. 578.) " 'The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic.' [Citations.]" (*Gale v. Witt* (1948) 31 Cal.2d 362, 365 (*Gale*).) "[I]n an action for equitable relief based upon extrinsic fraud in obtaining a judgment, the facts constituting the fraud must be pleaded with particularity and specifically. [Citations.]" (*Hammell v. Britton* (1941) 19 Cal.2d 72, 82 (*Hammell*).)

"Extrinsic fraud is a broad concept that 'tend[s] to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing.' [Citations.] It 'usually arises when a party . . . has been "deliberately kept in ignorance of the action or proceeding or in some other way fraudulently prevented from presenting his claim or defense" [Citation.]' [Citations.]" (*In re Marriage of Modnick* (1983) 33 Cal.3d 897, 905 (*Marriage of Modnick*).) The essence of extrinsic fraud is fraud that deprives a party of his or her day in court. (See *Gale*, *supra*, 31 Cal.2d at p. 365; *City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1067.)

"No abstract formula exists for determining whether a particular case involves extrinsic, rather than intrinsic, fraud." (*Marriage of Modnick, supra,* 33 Cal.3d at p. 905.) However, it has been "uniformly held that perjury is intrinsic, and not extrinsic, fraud, and therefore does not constitute a sufficient basis for equitable relief against a final judgment. [Citations.]" (*Adams v. Martin* (1935) 3 Cal.2d 246, 248-249 (*per curiam*); see *Hammell, supra,* 19 Cal.2d at pp. 82-83 ["False or perjured testimony is not extrinsic fraud. [Citations.]"]; see also *Horton v. Horton* (1941) 18 Cal.2d 579, 584.)

The "concern for the finality of adjudication" "underlies [a] line of cases that forbid direct or collateral attack on a judgment on the ground that evidence was falsified, concealed, or suppressed." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 10 (*Cedars-Sinai*).) "After the time for seeking a new trial has expired and any appeals have been exhausted, a final judgment may not be directly attacked and set aside on the ground that evidence has been suppressed, concealed, or falsified; in the language of the cases, such fraud is 'intrinsic' rather than 'extrinsic.' [Citations.] Similarly, under the doctrines of res judicata and collateral estoppel a judgment may not be collaterally attacked on the ground that evidence was falsified or destroyed. [Citations.]" (*Ibid.*)

"[T]he rule against vacating judgments on the ground of false evidence or other intrinsic fraud serves the important interest of finality in adjudication." (*Cedars-Sinai, supra,* 18 Cal.4th at p. 10.) The California Supreme Court has stated: "For our justice system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings. To allow a litigant to attack the integrity of evidence after the proceedings have concluded, except in the most narrowly circumscribed situations, such as extrinsic fraud, would impermissibly burden, if not inundate, our justice system. [Citations.]" (*Silber, supra,* 50 Cal.3d at p. 214.)

Equitable relief from a final judgment is denied where the party seeking relief had notice of an action, was not prevented from participating in the action, and had the "opportunity to present his case to the court and to protect himself from mistake or from

any fraud attempted by his adversary. [Citations.]" (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 472.) The general rule against vacating a final judgment or order based on intrinsic fraud has been applied even where there was not a fully litigated trial.

In *Beresh v. Sovereign Life Ins. Co.* (1979) 92 Cal.App.3d 547 (*Beresh*), more than six months after the trial court had granted summary judgments in favor of the respondents and the expiration of the six-month statutory period for filing a section 473 motion for relief, the appellants filed a motion to vacate the summary judgments on the ground that they had been obtained through false affidavits. (*Beresh*, *supra*, at pp. 551-554.) Appellants' motion to vacate was "based primarily on the power of the court to grant equitable relief from a judgment procured by extrinsic fraud" (*id*. at p. 553). The alleged fraud consisted of " 'deliberate, intentional misrepresentations, untruths, half truths [*sic*], and deceitfully misleading affidavits, arguments and declarations.' " (*Ibid*., fn. omitted.) The appellate court concluded that trial court properly denied the motion to vacate because the appellants had "not shown that the summary judgments were procured by extrinsic fraud" and had not filed their motion "within the six-month time limitation of section 473." (*Id*. at p. 554.)

Nevertheless, Laue suggests that intrinsic fraud can be a sufficient basis for equitable relief setting aside the trial court's order granting Ortiz's anti-SLAPP motion in CV250570. He argues that the extrinsic fraud limitation on equitable relief "applies to full adversarial trial[s] and not a summary procedure like an anti-SLAPP motion." He cites cases concerning arbitration awards and asserts that the dicta in a trio of 1978 arbitration cases support a "relaxed vacatur standard" based on intrinsic fraud. We are not convinced.

The authority to vacate a state arbitration award is governed by statute, and a trial court may vacate such an award if it determines that "[t]he award was procured by corruption, fraud or other undue means." (§ 1286.2, subd. (a)(1).) It has been generally held that the word "fraud" as used in that statute means extrinsic fraud. (See, e.g.,

Comerica Bank v. Howsam (2012) 208 Cal.App.4th 790, 825; *Pacific Crown Distributors v. Brotherhood of Teamsters* (1986) 183 Cal.App.3d 1138, 1147.)

As noted by Laue, in *Pour Le Bebe, Inc. v. Guess*? *Inc.* (2003) 112 Cal.App.4th 810, an appellate court observed that "[b]ecause parties to an arbitration are not afforded the full panoply of procedural rights available to civil litigants, lacking for example the right to an appeal or to extensive discovery, courts generally take a more lenient approach when examining intrinsic fraud in the context of a motion to vacate an arbitration award." (*Id*. at p. 829.) But even in *Pour Le Bebe*, the appellate court recognized: "[C]ourts have not equated the conduct necessary for setting aside a judgment with the conduct necessary for vacating an arbitration award. With regard to an attack on a judgment, the distinction between intrinsic and extrinsic fraud is of critical importance because intrinsic fraud cannot be used to overthrow a judgment, even where the party was unaware of the fraud at the time and did not have a chance to raise it at trial. [Citation.]" (*Id*. at p. 828.)

Laue's action sought equitable relief, not relief authorized by any statute. Decisions of the California Supreme Court regarding the extent of courts' equitable power to set aside final judgments on the ground of fraud are binding and must be followed by lower courts, including this court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Here, the complaint's material factual allegations, accepted as true, do not show that Laue was fraudulently prevented by *extrinsic* fraud from appearing in opposition to the anti-SLAPP motion in CV250570, from presenting evidence sufficient to overcome the litigation privilege and show a probability of prevailing on his claims (see 425.16, subd. (b)(1)), or from otherwise having his day in court. The complaint's allegations that Ortiz prevailed on her anti-SLAPP motion in CV250570 through perjury or intrinsic fraud are not enough to support an independent equitable action to set aside the order

granting the motion. The trial court properly sustained the demurrer for failure to state a cause of action.[17]

Laue argues on appeal that Ortiz engaged in activity outside the protection of the anti-SLAPP statue because (1) Ortiz made false statements and reports to police, (2) her May 17, 2013 letter to his landlord constituted extortion, and (3) false police reports, extortion, and perjury are against public policy and illegal. "It is a general rule that equity will not interfere with a judgment which is unjust unless it appears that the one whose interests were thus infringed can present a meritorious case. [Citations.]" (*Olivera*, *supra*, 19 Cal.2d at pp. 578-579.) For example, where a plaintiff in an equitable action seeks to set aside a default judgment, the complaint must allege facts showing that "the plaintiff has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding." (*Id*. at p. 579; see *In re Marriage of Park* (1980) 27 Cal.3d 337, 346 [where husband concealed that wife had been involuntarily deported and in her absence obtained a judgment awarding custody of the children and substantially all of the community property to him, on her motion to vacate the judgment wife "must show facts indicating a sufficiently meritorious claim to entitle her to a fair adversary hearing"].) Since Laue's complaint lacks factual allegations showing extrinsic fraud or extrinsic mistake, however, his arguments going to the merits of his lawsuit in CV250570

[17] As the California Supreme Court has recognized, "a court has inherent power, apart from statute, to correct its records by vacating a judgment which is void on its face. . . ." (*Olivera*, *supra*, 19 Cal.2d at p. 574; see *People v. American Contractors Indemnity Co*. (2004) 33 Cal.4th 653, 660 [a judgment is void if the trial court lacked jurisdiction in a fundamental sense].) On appeal, Laue also argues that the court had inherent power to set aside the order granting Ortiz's anti-SLAPP motion because it was "based on her own fraud" and "therefore void." "Fundamental jurisdiction is, at its core, authority over both the subject matter and the parties. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 ['Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.'].)" (*People v. Chavez* (2018) 4 Cal.5th 771, 780.) The complaint in this case did not allege facts showing that the court lacked fundamental jurisdiction when it granted Ortiz's anti-SLAPP motion in CV250570.

are unavailing and do not alter our conclusion that the trial court correctly sustained the demurrer in this case.[18]

Laue's assertions that the trial court in CV250570 violated his due process and equal protection rights by granting Ortiz's anti-SLAPP motion based on her allegedly perjurious declaration and that his constitutional rights "must be balanced" against Ortiz's constitutional rights provide no legal basis for overturning the trial court's order sustaining the demurrer in this case.

B. *Order Declaring Laue to be a Vexatious Litigant*

"The vexatious litigant statutes . . . are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants. [Citation.]" (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169.) Ortiz filed a motion for an order requiring Laue to furnish security on the ground that Laue was a vexatious litigant and there was "no reasonable probability that he will prevail in the litigation against" her. (See §§ 391.1, 391, subd. (b)(2).[19]). The court made those

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[18] Since this court is not reversing the judgment and overturning the trial court's order sustaining the demurrer, we do not reach Laue's request for discovery orders.

[19] Section 391.1 states in part that a "motion for an order requiring the plaintiff to furnish security shall be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he or she will prevail in the litigation against the moving defendant." Section 391, subdivision (b), defines the term "vexatious litigant" to mean "a person who does any of the following: [¶] (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. [¶] (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined. [¶] (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions,

findings and ordered Laue to furnish security in the amount of $25,000 pursuant to section 391.3, subdivision (a), to avoid dismissal of his complaint.[20]

On appeal, Laue wishes us to review the court's finding that he is a vexatious litigant. As a threshold matter, we presume that the prejudgment order pursuant to section 391.3 was not a separately appealable order from which Laue failed to timely appeal. (See *Golin v. Allenby* (2010) 190 Cal.App.4th 616, 635; but cf. *In re Marriage of Rifkin & Carty* (2015) 234 Cal.App.4th 1339, 1347 (*Marriage of Rifkin & Carty)* [vexatious litigant prefiling order was appealable as an injunction pursuant to section 904.1, subdivision (a)(6)]; *Luckett v. Panos* (2008) 161 Cal.App.4th 77, 81 [order declining to lift a vexatious litigant prefiling order was appealable as an order refusing to dissolve an injunction pursuant to section 904.1, subdivision (a)(6)].) We also presume that the prejudgment order is within the scope of review on appeal from the judgment. (See § 906; cf. *Marriage of Rifkin & Carty*, *supra*, at p. 1347.)

As to the court's finding that he was a vexatious litigant, Laue queries whether the trial court violated his First Amendment right of petition by deeming him a vexatious litigant and requiring him to post security when an attorney could not be sanctioned for the same conduct. Without any citation to supporting legal authorities, Laue asserts that to declare him "a vexatious litigant for utilizing an accepted legal procedure to correct an

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pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. [¶] (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence."

[20] Section 391.3, sudivision (a), provides in pertinent part: "[I]f, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix." Section 391.4 provides that "[w]hen security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished."

obvious injustice violates his constitutional right[s] to due process and equal protection." He baldly states that "[t]he same laws and procedures apply whether [he] is self-represented or represented by an attorney."

Laue ignores cardinal rules of appellate review. "[I]t it is settled that: '[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see Cal. Const., art. VI, § 13.)

"[I]t is not this court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness." (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 600; see *Stanley, supra,* 10 Cal.4th at p. 793.) Neither is it this court's function to render advisory opinions on an abstract question. (See *People ex rel. Lynch, supra,* 1 Cal.3d at p. 912; see *Consolidated Vultee Air. Corp., supra,* 27 Cal.2d at pp. 862-863.)

"An appellate court is not required to examine undeveloped claims [or] to make arguments for parties. [Citation.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) " '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*Stanley, supra,* 10 Cal.4th at p. 793; see Rule 8.204(a)(1)(B).) "The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived. [Citations.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) We deem Laue's conclusory and perfunctory assertions that the trial court violated his constitutional rights by declaring him a vexatious litigant to be forfeited. (See *Stanley, supra,* at p. 793.)

C. *No Award of Attorney Fees as Sanctions Against Ortiz*

Laue urges this court to award attorney fees to him, as the prevailing plaintiff, to sanction Ortiz pursuant to sections 425.16(c)(1) and 128.5. Section 425.16(c)(1) applies to an anti-SLAPP motion, not to an independent action in equity. Section 128.5 empowers trial courts, not appellate courts, to impose monetary sanctions under specified circumstances. In addition, Laue is not the prevailing party in this appeal. Also, he was not represented by counsel either below or on appeal. (Cf. *Musaelian v. Adams* (2009) 45 Cal.4th 512, 515 ["section 128.7 does not authorize sanctions in the form of an award of attorney fees to self-represented attorneys"].) Neither has Laue moved for sanctions on appeal using the proper procedure. (See rules 8.276, 8.54(a).) Laue is not entitled an award of attorney fees as sanctions.

DISPOSITION

In H044063, the appeal is dismissed. Laue shall bear all costs on appeal.

In H043206, the trial court's November 20, 2015 order granting Ortiz's anti-SLAPP motion is reversed. Upon remand, the trial court shall correct its order with respect to the complaint's ninth cause of action by striking the ninth cause of action's claim for intentional infliction of emotional distress based on activities protected by section 425.16 and its corresponding allegations. The court shall leave intact the ninth cause of action's claim for intentional infliction of emotional distress based upon purely unprotected activity and its corresponding allegations. The parties shall bear their own costs on appeal.

In H043713, the judgment is affirmed. Laue shall bear all costs on appeal.

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ELIA, ACTING P. J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.

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